Mohd Yusof bin Abu Othman & Anor v Dato' Kamarul Baharin bin Abbas

HIGH COURT (KUALA LUMPUR) — GUAMAN SIVIL NO D2–22–3781 OF 1998
ABDUL AZIZ JCA
14 JANUARY 2004

Contract — Sale and purchase of shares — Failure to pay balance price — Defendant-seller forfeited 10% of purchase price — Whether plaintiffs-buyers to pay interest on balance of purchase price — Whether interest payable provided plaintiffs-buyers decide to proceed with purchase

This was the plaintiffs' application for summary judgment on their claim for specific performance of an agreement ('the main agreement') for the sale of shares in a company in which the plaintiffs, the defendant, and another person were shareholders and directors. By cl 2 of the main agreement, the defendant agreed to sell and the plaintiffs agreed to buy 1,689,600 shares in the company ('the first agreement'). The plaintiffs paid RM422,400 or 10% of the purchase price ('the first sum') to the defendant upon execution of the main agreement. The balance of the purchase price amounting to RM3,801,600 was payable within three months thereafter, that is, by 30 October 1997, which period was subject to an automatic extension of three months for which interest at the rate of 12% pa was payable. The first part of cl 4 of the main agreement provided that the plaintiffs' failure to pay the balance would result in the forfeiture of the first sum and thereafter the first agreement would come to an end. The second part of cl 4 provided that upon that event happening, the plaintiffs would then sell and the defendant would buy the plaintiffs' 1,689,600 shares in the company upon the same terms as that contained in the main agreement ('the second agreement'). On 26 January 1998, during the three-month extension period, the plaintiffs' solicitors wrote to the defendant's solicitors stating that the plaintiffs were no longer interested to purchase the defendant's shares and would not be paying the balance purchase price. Applying cl 3 to the second agreement, the defendant had to pay RM422,400 to the plaintiffs upon the formation of the second agreement, that is, upon the cessation of the first agreement on 26 January 1998, and the balance of RM3,801,600 within three months thereafter, subject to an interest-bearing extension of a further three months until 26 July 1998. The defendant did not pay the sum of RM422,400. On 15 May 1998 the plaintiffs' solicitors informed the defendant's solicitors that the plaintiffs were agreeable to accept payment of the first sum by noon of 30 June 1998 but that the balance sum had to be paid by 26 July 1998, subject to payment of interest for the period of extension. The defendant neither paid the sum of RM422,400 nor the balance of the purchase price to the plaintiffs. The defendant counterclaimed for, *inter alia*, interest of RM114,048 on the balance sum of RM3,801,600 at 12% pa for the three month period of extension in respect of the first agreement. The defendant further alleged that there was a collateral agreement between the plaintiffs and the defendant that he was not bound to honour the second agreement until the shareholders of the company had transferred a specified number of shares they each owned in the company to the management and staff of the company ('collateral agreement').

Held, allowing the plaintiffs' application:

(1) Assuming that the plaintiffs were bound to pay interest under the first agreement, the main agreement did not say that the defendant was not bound to complete or honour the second agreement unless the plaintiffs paid the interest due under the first agreement. The plaintiffs might have decided not to proceed with the first agreement in the first three months, and then there would have been no question of the plaintiffs being liable to pay interest, but the defendant would have been bound to honour the second agreement all the same. The claim for the interest, which was not and could not be in the nature of a set-off, could not prevent the granting of summary judgment on the plaintiffs' claim for specific performance of the second agreement (see para 13).

(2) The first part of cl 4 provided that the plaintiffs' failure to purchase would result in the forfeiture of the first payment of RM422,400. It did not say that it would also result in the plaintiffs having to pay the interest for any extension of the completion date. Interest for the extension period in respect of the first agreement was payable only if the plaintiffs decided to proceed with the purchase, the rationale for the interest being that the plaintiffs would then enjoy the fruit of the purchase despite their delay in completing whereas the defendant would receive the full amount later than the first three months. It was to compensate the defendant for having to part with the property but getting his money late, so that the defendant could refuse to complete if the interest was not paid (see para 15).

(3) But where, as actually happened, the plaintiffs did not wish to proceed with the purchase, they not only did not get the property but they lost the first sum which was forfeited automatically. It could not be that the plaintiffs would also have to pay the interest that they would have to pay had they proceeded with the sale. Interest went with completion whereas forfeiture went with failure to complete. There would then be a proper balance. There would be no proper balance if interest, and also forfeiture, were to go with failure to complete (see para 15).

(4) The collateral agreement was nothing more than an afterthought. The collateral agreement, if it existed, would have been a fundamental overriding agreement to which all other terms of the main agreement would have been subject. It was inconceivable that such an important agreement, if it existed, would not have been incorporated in the main agreement (see para 34).

(5) There was no triable issue raise by the defendant and there was no reason why summary judgment should not be granted (see para 36).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif-plaintif untuk penghakiman terus pada tuntutan mereka untuk pelaksanaan spesifik satu perjanjian ('perjanjian utama') untuk jualan saham syarikat di mana plaintif-plaintif, defendan dan satu orang lagi adalah pemegang syer dan pengarah-pengarah. Melalui kl 2 perjanjian utama, defendan bersetuju menjual dan plaintif-plaintif bersetuju

membeli 1,689,600 saham syarikat tersebut ('perjanjian pertama'). Plaintif-plaintif telah membayar RM422,400 atau 10% harga belian ('jumlah pertama') kepada defendan setelah melaksanakan perjanjian utama itu. Baki harga belian berjumlah RM3,801,600 boleh dibayar di dalam masa tiga bulan selepas itu, iaitu sehingga 30 Oktober 1997, yang tertakluk kepada perlanjutan tiga bulan dan faedah sejumlah 12% setahun. Bahagian pertama kl 4 perjanjian utama itu memperuntukkan bahawa kegagalan plaintif-plaintif untuk membayar baki jumlah itu akan mengakibatkan perlucuthakan jumlah pertama dan selepas itu perjanjian itu akan ditamatkan. Bahagian kedua kl 4 memperuntukkan bahawa jika kejadian itu berlaku, plaintif-plaintif akan menjual dan defendan akan membeli 1,689,600 saham plaintif-plaintif di dalam syarikat itu di atas terma-terma yang sama seperti di dalam perjanjian utama ('perjanjian kedua'). Pada 26 Januari 1998, semasa perlanjutan tiga bulan, peguamcara plaintif-plaintif telah menulis kepada peguamcara defendan bahawa plaintif-plaintif tidak berminat membeli saham–saham defendan dan tidak akan membayar baki harga belian. Dengan memakai kl 3 perjanjian kedua, defendan dikehendaki membayar RM422,400 kepada plaintif-plaintif apabila perjanjian kedua dibuat, iaitu selepas pemberhentian perjanjian pertama pada 26 Januari 1998, dan membayar RM3,801,600 di dalam masa tiga bulan selepas itu, tertakluk kepada perlanjutan yang memberi faedah untuk tempoh tiga bulan sehingga 26 Julai 1998. Defendan tidak membayar jumlah RM422,400. Pada 15 Mei 1998 peguamcara plaintif-plaintif memberitahu peguamcara defendan bahawa plaintif-plaintif bersetuju menerima bayaran untuk jumlah itu pada tengahari 30 Jun 1998 tetapi baki jumlah itu perlu dibayar pada 26 Julai 1998, tertakluk kepada bayaran faedah untuk tempoh perlanjutan. Defendan tidak membayar jumlah RM422,400 ataupun baki jumlah harga belian kepada plaintif-plaintif. Defendan telah menuntut balas, antara lain, untuk faedah RM114,048 pada baki jumlah RM3,801600 pada 12% setahun untuk tempoh perlanjutan tiga bulan berkait dengan perjanjian pertama. Defendan juga menghujah bahawa terdapat perjanjian kolateral di antara plaintif-plaintif dan defendan tidak perlu menghormati perjanjian kedua sehingga pemegang-pemegang syer syarikat itu memindahkan jumlah tertentu saham yang dipunya oleh mereka di dalam syarikat itu kepada pihak pengurus dan pekerja-pekerja di syarikat itu ('perjanjian kolateral').

Diputuskan, membenarkan rayuan tersebut:

(1) Dengan menganggap bahawa plaintif-plaintif perlu membayar faedah di bawah perjanjian pertama, perjanjian utama tidak mengatakan bahawa defendan tidak perlu meyempurnakan atau menghormati perjanjian kedua sehingga plaintif-plaintif membayar faedah yang perlu dibayar di bawah perjanjian pertama. Plaintif-plaintif mungkin membuat keputusan untuk tidak meneruskan perjanjian pertama di dalam tiga bulan pertama, dan jika itu, tiada persoalan untuk plaintif membayar faedah, tetapi defendan akan terikat untuk menghormati perjanjian kedua juga. Tuntutan untuk faedah, yang bukan merupakan dan tidak bersifat tolakan, tidak dapat menghalang pemberian penghakiman terus pada tuntutan plaintif-plaintif untuk pelaksanaan spesifik perjanjian kedua (lihat perenggan 13).

(2) Bahagian pertama kl 4 memperuntukkan bahawa kegagalan plaintif-plaintif untuk membeli akan mengakibatkan perlucuthakan bayaran pertama RM422,400. Ia tidak berkata bahawa ia juga akan mengakibatkan plaintif-plaintif perlu membayar faedah untuk sebarang perlanjutan tarikh persiapan. Faedah untuk tempoh perlanjutan untuk perjanjian pertama hanya dapat dibayar jika plaintif-plaintif membuat keputusan untuk membeli, rasional untuk faedah adalah plaintif-plaintif akan menikmati belian itu walaupun kelewatan mereka di dalam penyempurnaan manakala defendan akan menerima jumlah penuh lebih lewat daripada tiga bulan pertama. Ini adalah untuk memberi pampasan kepada defendan sebab defendan menjual harta itu tetapi mendapat bayaran untuk harta itu lewat, dan defendan boleh enggan melaksanakan jika faedah tidak dibayar (lihat perenggan 15).

(3) Tetapi di mana, seperti yang berlaku di sini, plaintif-plaintif tidak hendak meneruskan pembelian tersebut, mereka tidak hanya tidak mendapat harta itu, tetapi mereka hilang jumlah pertama yang dilucuthakan secara automatik. Tidak mungkin bahawa plaintif-plaintif juga dikehendaki membayar faedah yang mereka perlu bayar jika mereka terus dengan belian itu. Faedah mengikut penyempurnaan manakala perlucuthakan mengikut kegagalan menyempurnakan. Terdapat keseimbangan begitu. Tiada keseimbangan jika faedah, dan juga perlucuthakan, akan mengikut kegagalan menyempurnakan (lihat perenggan 15).

(4) Perjanjian kolateral hanya merupakan sesuatu yang difikirkan kemudian. Perjanjian kolateral, jika ia wujud, akan menjadi perjanjian pengatasan yang penting kepada mana semua terma yang lain tertakluk. Ia tidak dapat dibayangkan bahawa perjanjian yang sebegitu penting, jika ia wujud, tidak dimasukkan ke dalam perjanjian utama (lihat perenggan 34).

(5) Tiada isu yang dapat dibicarakan yang dibangkitkan oleh defendan dan tiada sebab mengapa penghakiman terus tidak patut diberikan (lihat perenggan 36).]

Notes

For cases on contract of sale of shares, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4416, 4458–4461

Cases referred to

Paramount Corporation Bhd v Mulpha Pacific Sdn Bhd [1999] 5 CLJ 539 (distd)

Ong Chee Kuan (Harcharan Singh with him) (Harcharan & Co) for the plaintiffs
Au Yong Pei Yi (Cheah Teh & Su) for the defendant

Abdul Aziz JCA:

[1] This was an application by the plaintiffs for summary judgment on their claim for specific performance of an agreement dated 1 August 1997

for the sale of shares in a company called Tenaga Ehsan Sdn Bhd ('the company') of which the plaintiffs, the defendant, and another person were the shareholders and directors.

[2] It was an agreement in Malay and in effect it was a compendium of two agreements.

[3] By cl 2 the defendant agreed to sell and the plaintiffs agreed to buy 1,689,600 shares. Clause 3 fixed the price at RM4,224,000 (RM2.50 per share) to be paid, as to RM422,400 (10%), on the execution of the agreement (which the plaintiffs did pay) and, as to the balance of RM3,801,600, within three months of the date of the agreement, that is by 30 October 1997, which period was subject to an automatic extension of three months, that is up to 31 January 1998, for which interest was payable at the rate of 12%pa.

[4] Clause 4 was the crucial clause. In effect it had two parts. The first part provided that the plaintiffs' failure to pay the balance would result in the forfeiture of the first payment of RM422,400 to the defendant and thereafter the agreement shall come to an end. The effect of that part was to entitle the plaintiffs, if they were prepared to forfeit the sum of RM422,400, to refuse at any time to proceed with the purchase the defendant's shares.

[5] That was what actually happened. On 26 January 1998, during the period of extension of three months that had commenced on 1 November 1997 but before its expiry on 31 January 1998, the plaintiffs' solicitors wrote to the defendant's solicitors to say that the plaintiffs were no longer interested to purchase the defendant's shares and would not be paying the balance purchase price.

[6] To return to cl 4, the second part, which began immediately after the statement that the agreement shall come to an end, provided that the plaintiffs shall sell and the defendant shall buy the plaintiffs' 1,689,600 shares subject, *mutatis mutandis,* to the same terms as were contained in the agreement. That was why I said that the agreement was a compendium of two agreements, the second part of cl 4 being the formation of a second agreement.

[7] Applying cl 3, *mutatis mutandis,* to the second agreement the defendant had to pay RM422,400 to the plaintiffs upon the formation of the second agreement, that is upon the cessation of the first agreement on 26 January 1998, and the balance of RM3,801,600 within three months of that date, that is by 25 April 1998, subject to an interest-bearing extension of a further three months until 26 July 1998. By their said letter of 26 January 1998, therefore, the plaintiffs' solicitors demanded payment of the sum of RM422,400, saying in effect that the second agreement came into force on the date of the letter, but they gave the defendant seven days within which to pay the sum.

[8] When, after the first three months had passed, the defendant had not even paid the sum of RM422,400, let alone the balance, on 4 May 1998 the plaintiffs' solicitors wrote to the defendant's solicitors giving the defendant another four days to pay the first sum of RM422,400.

[9] The defendant's solicitors, a different firm this time, replied on 14 May

to say that the defendant was prepared to proceed with the purchase of the plaintiffs' shares and would be paying the first sum of RM422,400 by the end of June 1998, that is before the end of the interest-bearing extension period of three months on 26 July 1988. The only thing in the nature of a complaint or dispute that the defendant raised through that letter was his failure to understand why he had to pay the sum within four days of 4 May 1998 since the agreement was silent as to the date of payment. Obviously the defendant (or their new solicitors) either did not appreciate the effect of the second part of cl 4 or had not seen or had overlooked the letter of the plaintiffs' solicitors dated 26 January 1998.

[10] On 15 May 1998 the plaintiffs' solicitors replied to the defendant's new solicitors, saying that as a gesture of goodwill the plaintiffs were agreeable to accept payment of the first sum by the noon of 30 June 1998 but the date for paying the balance must remain to be calculated as from 26 January 1998, that is, with the extension, by 26 July 1998, subject to interest for the period of extension.

[11] The defendant did not pay the first sum and, of course, the balance. So on 13 October 1998 the plaintiffs filed their writ and statement of claim for specific performance of the second agreement and on 4 January 1999 filed their application for summary judgment. In the application, apart from an order for specific performance, the plaintiffs also sought an order that the defendant pay them the sum of RM4,224,000, which was the contract price for the shares, and interest at 12% pa on RM422,400, that is the first sum, from 3 February 1998, the date by when the defendant should have paid it according to the letter of the plaintiffs' solicitors dated 26 January 1998, and on RM3,801,600, that is the balance sum, from 26 April 1998, that is the date on which the interest-bearing extension period began.

[12] **[12]**In submission, the defendant's counsel raised only two issues. One issue was as regards interest. The defendant had filed with his defence a counterclaim for, *inter alia*, interest in the sum of RM114,048 on the balance sum of RM3,801,600 at 12% pa from 2 November 1997 until 1 February 1998, that is the three month period of extension in respect of the first agreement. In submission the defendant's counsel reduced slightly the period for interest so as to be up to 26 January 1998 only, that is the date of the letter of the plaintiffs' solicitors which ended the first agreement and brought to life the second agreement, saying that the defendant was entitled to interest for that period of extension and that until the interest was paid the defendant was not obliged to complete the second agreement.

[13] Assuming that the plaintiffs were bound to pay interest under the first agreement, the agreement did not say that the defendant was not bound to complete or honour the second agreement unless the plaintiffs paid the interest due under the first agreement. Further there was nothing in the arrangement between the parties to be seen in the entire agreement that could reasonably or logically lead to the supposition that the parties envisaged that the defendant relied on the payment of interest for his ability to make the first payment under the second agreement. The plaintiffs might have

A decided not to proceed with the first agreement in the first three months, and then there would have been no question of the plaintiffs being liable to pay interest, but the defendant would have been bound to honour the second agreement all the same.

[14] The interest, therefore, pertained only to the first agreement and was
B not connected with the second agreement. If the plaintiffs were bound to pay the interest, the defendant could sue for it as he had done through his counterclaim, on which he had filed an application for summary judgment which was yet to be heard by the senior assistant registrar. But the claim for the interest, which was not and could not be in the nature of a set-off, could
C not prevent the granting of summary judgment on the plaintiffs' claim for specific performance of the second agreement.

[15] But in any event I was of opinion that interest was not payable for the period of extension. The question of the plaintiffs' liability to pay the interest, although it was a question that was appropriate to the defendant's counterclaim,
D was nonetheless argued before me, with the defendant's counsel relying on *Paramount Corporation Bhd v Mulpha Pacific Sdn Bhd* [1999] 5 CLJ 539 for contending that interest was payable. The first part of cl 4, as I said, provided that the plaintiffs' failure to purchase would result in the forfeiture of the first payment of RM422,400. It did not say that it would also result in the plaintiffs' having to pay the interest for any extension of the completion
E deadline, so that it would be a fair question to ask whether the agreement intended that the interest would be payable upon the plaintiffs' failure to purchase. I was of opinion, differing with *Paramount Corporation,* that interest for the extension period was payable only if the plaintiffs decided to proceed with the purchase, the rationale for the interest being that the plaintiffs would then enjoy the fruit of the purchase despite their delay in completing, that
F is only after the first three months, whereas the defendant would receive the full amount later than the first three months. It was to compensate the defendant for having to part with the property but getting his money late, so that the defendant could refuse to complete if the interest was not paid. But where, as actually happened, the plaintiffs did not wish to proceed with the purchase,
G they not only did not get the property but they lost the 10% payment which was forfeited automatically. It could not be that the plaintiffs would also have to pay the interest that they would have to pay if they wished to proceed with the sale. Interest goes with completion. Forfeiture goes with failure to complete. There would then be a proper balance. There would be no proper balance if interest, and also forfeiture, were to go with failure to complete.

H **[16]** In *Paramount Corporation,* the extension clause was cl 4.2, which read as follows:

> PROVIDED ALWAYS and it is hereby agreed between the parties hereto that the Purchaser shall be entitled to an extension of one (1) month, commencing on the
I day immediately after the Completion Date (hereinafter referred to as 'the Extended Completion Date') subject to payment of the Agreed Interest calculated on a daily basis on the Balance Sum outstanding Provided that all accrued Agreed Interest shall be paid together with the Balance Sum.

[17] In the present case it was cl 3(b), a somewhat simpler clause as to when the balance of RM3,801,600 was to be paid, which said:

> Baki sebanyak Ringgit Malaysia Tiga Juta Lapan Ratus Satu Ribu dan Enam Ratus (RM3,801,600.00) sahaja dibayar dalam tempoh tiga (3) bulan dari tarikh Perjanjian ini ditandatangani, tertakluk kepada tiga (3) bulan tambahan tempoh masa yang dikenakan faedah dua belas peratus (12%) setahun ke atas jumlah baki tersebut.

[18] The learned judge in *Paramount Corporation,* Low Hop Bing J, viewed cl 4.2 as permitting the purchaser 'to buy additional time to fulfil an obligation that has already fallen due and the [purchaser] has agreed contractually to make payment for that additional time' (p 544). A little further on he said:

> Therefore this part of cl 4.2 provides that in consideration of the plaintiff agreeing to grant additional time to the defendant, the defendant agreed to pay daily sums calculated on the agreed interest rate to the plaintiff for each day granted. Hence, the payment of interest prevails and is indeed a condition precedent to the granting of additional time by the plaintiff to the defendant. This obligation to pay interest is obviously in addition to the defendant's obligation to pay the balance sum.

[19] A feature that was common to the clauses in that case and in this case was that the extension of time was as of right and that the seller could not refuse to grant it. Another common feature was that the interest was not stated to be the price of the extension of time. Clause 4.2 in *Paramount Corporation* put the interest as the thing that the extension of time was subject to. Clause 3(b) in the present case put the interest as the thing imposed ('yang dikenakan') for the extension of time, which also meant that the extension of time was subject to the interest. Since the extension of time was as of right, the interest to which it was subject, if payable, would only be payable after the extended time had passed. In view of those factors I did not feel comfortable with the concept of the extension of time as a purchase of additional time at the price of the specified interest, which if not paid would constitute a separate debt. Under either clause, additional time would not be needed for its own sake, to do something with it. It was additional time to complete the agreement, so that the agreement could be completed later than the initial date. To me it would lend business efficacy to the agreement to view the matter as a delay in completing the agreement resulting in the increase in the price by the amount of the interest. Viewing the matter thus, the parties may be seen as having agreed that if the buyer delayed to complete, he must pay an increased price for the property, the price being increased by the stipulated interest. That, to me, was the significance of the condition in cl 4.2 in *Paramount Corporation* requiring that the interest 'shall be paid together with the Balance Sum'. Low Hop Bing J (p 545) took the phrase 'together with' as meaning 'that the accrued agreed interest is to be paid at the same time fixed by cl 4.2 for the payment of the balance sum', that is to say, he took the phrase as fixing the time at which the interest must be paid, the time being that at which the balance purchase price was to be paid, even though it was not paid. But if that had been the intention, it could easily have been directly expressed without its being made to hide shyly behind the words 'paid together with'. To me those words envisaged a situation of actual payment of the balance

sum. The buyer was to pay the interest when they paid the balance sum, as though it were part of the balance sum. If they failed to pay the interest together with the balance sum, they would fail to complete and they would not get the property and the seller would forfeit the deposit. There would be no question of suing for the interest. The interest was not interest that would be payable in any event but only if the buyer wished to enjoy the purpose of the extension of time, namely the delayed purchase.

[20] The other issue that the defendant's counsel raised in submission was the question of an alleged collateral agreement. To understand this issue it is necessary to set out a scheme of reorganization of shareholding in the company that the defendant related in his affidavit dated 26 February 1999, paras 6 to 8, As it was set out in those paragraphs, it was to my understanding a scheme that was to develop from one original position of shareholding, called in para 6 'the current registered shareholdings', to an ultimate target shareholding. The original position of shareholding was this:

First plaintiff	—	1,267,200 shares	—	22.5%
Second plaintiff	—	1,267,200 shares	—	22.5%
Defendant	—	1,830,400 shares	—	32.5%
Dato' Zainal Abidin	—	1,267,200 shares	—	22.5%
Total	—	5,632,000 shares	—	100%

[21] Of the defendant's 1,830,400 shares, 1,698,400 shares were said to be covered by share certificates No 12, 13 and 15. Of Dato' Zainal Abidin's 1,267,200 shares, 281,600 shares were said to be covered by share certificate No. 14.

[22] In para 7 the defendant said that on 13 May 1996, which was more than one year before the agreement in this case dated 1 August 1997, the four shareholders, being also the directors, passed a resolution in a board meeting to transfer 10% of the total shareholding of 5,632,000, that is 563,200 shares, to the management and staff of the company's group of companies by each director transferring 140,800 shares. The resulting shareholding, if the resolution were carried out, would be:

First plaintiff	—	1,126,400 shares	—	20%
Second plaintiff	—	1,126,400 shares	—	20%
Defendant	—	1,689,600 shares	—	30%
Dato' Zainal Abidin	—	1,126,400 shares	—	20%
Management and staff	—	563,200 shares	—	10%
Total	—	5,632,000 shares	—	100%

[23] In para 8 the defendant said that at a board meeting on 14 May 1997, which was some two to three months before the agreement in this case, it was resolved that the two plaintiffs and he shall each transfer 281,600 shares to

Dato' Zainal Abidin. By my reckoning, the resulting shareholding, if the resolution were carried out, should be:

First plaintiff	—	844,800 shares	—	15%
Second plaintiff	—	844,800 shares	—	15%
Defendant	—	1,408,000 shares	—	25%
Dato' Zainal Abidin	—	1,971,200 shares	—	35%
Management and staff	—	563,200 shares	—	10%
Total	—	5,632,000 shares	—	100%

[24] But the defendant in para 8 said that the transfers resolved on 14 May 1997 would result in the following shareholding:

First plaintiff	—	844,800 shares	—	15%
Second plaintiff	—	844,800 shares	—	15%
Defendant	—	1,689,600 shares	—	30%
Dato' Zainal Abidin	—	1,689,600 shares	—	30%
Management and staff	—	563,200 shares	—	10%
Total	—	5,632,000 shares	—	100%

[25] That state of shareholding would be achieved only if it was only the two plaintiffs, and not the defendant as well, who would have to transfer 281,600 shares each to Dato' Zainal Abidin.

[26] In para 9 the defendant said that after the board meeting of 14 May 1997 the plaintiffs and he started negotiations on the shares because they had some differences of opinion with regard to the operation of the company.

[27] In para 11 the defendant said that when the agreement was made on 1 August 1997 the understanding of all parties was that if the plaintiffs failed to buy the defendant out of the company, the defendant would buy the plaintiffs out.

[28] The collateral agreement was alleged in para 12, which I quote:

> It was a collateral agreement reached between the plaintiffs and myself that the transfer of shares agreed to be carried out pursuant to the Board resolutions passed on 13 May 1996 and 14 May 1997 must be done before the completion of the said Agreement so as to give effect to the understanding set out in para 11 above which will achieve the underlying objective that either the plaintiffs or I, as the case might be, will no longer have any shares at all in the Company and will no longer be involved in the management and operation of the Company.

[29] I have already alluded to what appears to be an error somewhere in para 8. Now here come several developments, which, as the defendant set them out in his affidavit, have eluded my understanding.

[30] In paras 13 to 15, the defendant said that upon execution of the agreement on 1 August 1997 he submitted his share certificate No. 8 comprising 1,980,000 shares to the company secretary to carry out the transfer of shares pursuant to the resolutions. Certificate No. 8, said he, was cancelled and certificates No. 12, 13, 14 and 15, comprising 1,980,000 shares, were issued in its place to him. As has been stated, certificates No. 12, 13, 15 comprised 1,698,400 shares and certificate No. 14 comprised 281,600 shares. The defendant said that he transferred his 281,600 shares in certificate No. 14 to Dato' Zainal Abidin on 28 October 1997, which was a few days before 31October 1997, the end of the initial three months from the date of the agreement by when the defendant was to pay the balance of the purchase price of the plaintiffs' shares. As has been stated, the scheme of reorganization began at the point when the defendant held RM1,830,400 shares, which was more than one year before the date of the agreement. I have not been able to see how it came about that at the date of the agreement he was holding 1,980,000 shares under certificate No. 8. Further, at the starting point, as has been stated, of the 1,830,400 shares that the defendant held, 1,698,400 shares were already held under certificates No. 12, 13 and 15, but according to paras 13 to 15 those certificates came into being only after 1 August 1997, the date of the agreement, as a result of the cancellation of certificate No. 8. Further, as has been stated, at the starting point Dato' Zainal Abidin's 1,267,200 shares already included 281,600 shares under certificate No. 14. Yet according to paras 13 to 15 certificate No. 14 was transferred to him only on 28 October 1997. Those are the things that have eluded my understanding. I must confess that I noticed them only when preparing these grounds. Although their existence played no part in my decision on the question of the alleged collateral agreement, and neither were they remarked upon in submission, I feel that I must mention them in setting out the facts alleged in connexion with the question, as otherwise a person who reads those facts and notices the existence of those puzzling points might suppose that their existence is due to my having incorrectly set out the facts.

[31] As has been seen, when the plaintiffs on 26 January 1998 decided not to proceed with the purchase of the defendant's shares, they gave the defendant seven days to pay 10% (RM422,400) of the purchase price of the plaintiffs' shares, the balance to be paid by 25 April 1998 or, with extension, by 25July 1998. In para 17 the defendant explained that when the plaintiffs terminated their agreement to purchase, the defendant waited for the plaintiffs to transfer their portions of their shares in accordance with the resolutions of 13 May 1996 and 14 May 1997. The defendant must have meant to say that according to the alleged collateral agreement he was not bound to honour his agreement to purchase the plaintiffs' shares until they had made transfers of shares in accordance with the two resolutions, and he must have meant to give the plaintiffs' failure to carry out the transfers as a reason for not paying the initial sum of RM422,400.

[32] In paras 18 and 19 the defendant said that in June 1998 Dato' Zainal Abidin and he submitted share certificates to transfer their respective 140,800 shares, which must have been in compliance with the resolution of 13 May

1996, but the plaintiffs, despite reminders by the company secretary, had not complied with the two resolutions. June 1988 was one month before the defendant, with the extension, was finally bound to complete the agreement.

[33] In brief, the defendant's case was that since the plaintiffs had not complied with the two resolutions, by virtue of the alleged collateral agreement he was not yet bound to complete the agreement.

[34] I was in agreement with counsel for the plaintiffs that the collateral agreement was nothing more than an afterthought. The plaintiffs denied the existence of such a collateral agreement. Paragraph 12 of the defendant's affidavit in effect merely alleged the existence of a collateral agreement without narrating when it was reached in relation to the execution of the agreement of 1 August 1997 and what the circumstances were in which it was reached. The collateral agreement, if it existed, would have been a fundamental overriding agreement to which all other terms of the agreement of 1 August 1997 would have been subject. It would have entailed the upsetting of the times for performance that were specifically provided in the agreement, rendering them no longer specific but relative to an event. The defendant's failure even to pay the first 10% suggested a stand that unless the alleged collateral agreement was completely fulfilled, no party was obliged to begin performing the agreement of 1 August 1997, let alone complete it. It was to me inconceivable that such an important agreement, if it existed, would not have been incorporated in the main agreement, particularly as the contracting parties had agreed to have an entire-agreement clause in cl 14, which said:

> Perjanjian ini merupakan keseluruhan Perjanjian tunggal di antara pihak-pihak yang bersabit dan tiada sebarang apapun bentuk akuan, representasi, jaminan atau lain-lain terma atau syarat yang tidak terkandung dan tercatit dalam Perjanjian ini akan mempunyai sebarang force atau effect.

[35] Then, as has been related, when the plaintiffs demanded on 4 May 1998 payment of the first sum of RM422,400, the defendant did not reply in reliance on the alleged collateral agreement that he was not yet bound to pay it. His only reply was to say that he would be paying it by the end of June 1998. If there had been such a collateral agreement, it was to me inconceivable that the defendant would not have relied on it then. It would have been the first and most important point of defence for the defendant, yet he did not raise it in his original statement of defence or in his first affidavit in reply in the summary judgment proceedings.

[36] I found that in the two matters raised by the defendant before me there was no triable issue or any reason why summary judgment should not be granted.

Application for summary judgment granted.

Reported by Lim Lee Na